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No. 88-1841

In The

Supreme Court of the United States

October Term, 1989

INDIANA CIVIL RIGHTS COMMISSION
and DONNA MARIE WITTE
Petitioners

vs.

AMERICAN COMMERCIAL BARGE
LINE COMPANY
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS

BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Does the Admiralty and Maritime jurisdiction of the United States preempt and exclude the State of Indiana from enforcing its statutory prohibitions against employment handicap discrimination upon the navigable waters of the United States?

Does the federal judicially fashioned doctrine of seaworthiness constitute "business necessity" under Indiana statutes to exclude physically handicapped persons from employment as seamen aboard vessels upon the navigable waters?

May a maritime employer, operating vessels upon the navigable waters of the United States, maintain and apply minimum physical standards for seamen to provide a seaworthy vessel and seaworthy crew?

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STATEMENT OF THE CASE

American Commercial Barge Line Company (ACBL) operates a fleet of more than fifty towboats and over 1600 barges upon the inland rivers and the Gulf of Mexico. The towboats vary in size from the smaller 800 horsepower tugs measuring 75 feet long and 25 feet wide with a crew of four to the largest 8400 horsepower towboats measuring 185 feet long by 52 feet wide with a crew of twelve. While the smaller tugs are used primarily in the fleeting areas where barges are stored, the larger towboats operate on the Lower Mississippi River where there are no locks and dams and there are no restrictions on the size of the tow. The majority of the vessels operate on the so-called locking rivers. These rivers, such as the Ohio and Illinois, have a series of dams built upon them for flood control with adjacent locks to facilitate navigation. The typical locking river tow consists of fifteen barges, five long and three wide. The typical barge measures 195 feet long by 35 feet wide. Barges are either open hopper for bulk commodities such as coal or scrap, covered hopper barges for grain, and tank barges for carrying liquids.

The typical towboat has a crew of ten consisting of the Master/ Captain, Pilot, Chief Engineer, Cook and six Deckhands. The routine of the vessel is split into two six-hour watches called the forward-watch and the after-watch. Each crew member stands two watches in a twenty-four hour period.

Normal duties on watch include checking all barges for water leaks and water levels in the void areas between the cargo box and hull of the barge. If needed, these areas will be pumped, rigging between barges checked and tightened, maintenance and general housekeeping performed on the boat. The Pilot and his assigned Deckhands will perform similar duties on the after-watch.

Engineers as a general rule work the Captain's watch in the engine room. They are responsible for the vessel's machinery from its main propulsion engines, generators, etc., to deck winches. Additionally, the Engineer is responsible for fueling the vessel from vessels brought along side while continuing underway in the river.

Cooks generally work in the galley from 5:00 a.m. to 7:00 p.m. preparing and serving three meals a day for a one-hour period beginning at 5:30 a.m., 11:30 a.m. and 5:30 p.m. The Cook is also responsible for ordering groceries from boat stores at various points on the rivers. The groceries are delivered along with the fuel. The Cook and Engineer are responsible for the transfer of fuel and groceries. The vessels continue to move during the course of transfer. While the Engineer is responsible for the rigging and connection of fuel lines, the Cook must board the delivery vessel back and forth to the galley until all groceries have been transferred.

Other employees may be added to the above employees such as Trainee Engineers and Steermen who are learning to become river pilots.

River boats do not call at ports or remain too long in any one area. Crew changes are made at fleeting areas by tugs picking up and dropping off crew members. They are also made at customer's facilities such as grain elevators. They are commonly made at locks on the locking rivers where crew members must ascend and descent ladders in the lock wall to gain access to the tow. Crew changes are also made at landing points on the river where skiffs are brought to the bank. Additionally, crew changes are made by bringing the head of the tow or stern of the vessel as close as possible to the bank and having the crew members use a ladder (sometimes horizontal) for access. A crew member will carry his/her baggage in this process.

The tow itself presents a number of inherent dangers to the crew such as carrying wires, lines, ratchets, pumps, groceries or baggage. The walking surface presents a number of obstacles to casual strolling such as wires, ratchets, open man-holes, cargo, snow and ice. The typical twelve-foot deep barge is loaded to a nine-foot depth while empty barges usually ride at a depth of one and one-half feet. Where emptys and loads are in tandem, crew members must climb up and jump down seven or eight feet from barge to barge while transversing the tow. This maneuver requires not only alertness and balance, but good eye sight and depth per-

ception. The "head of the tow" on a typical five by three barge locking river tow is 1,000 feet from the boat. On Lower Mississippi River boats, this may be as much as 1,600 feet.

The current of the river is the most important element to be considered in the navigation of the vessel and the tow. At times, even the best and most experienced Captains and Pilots encounter unexpected changes in river conditions causing loss of control of the tow. High water and swift currents will take a tow into the bank. Low water will break a tow from grounding. When a tow breaks, rigging (1¼ inch steel cable), ratchets and barge hardware come apart. The current now takes control of the individual barges or units of barges creating additional dangers of collision, sinking and grounding. Into this situation, the entire crew must respond. The Captain sounds the general alarm and checks to see that all crew members are accounted for and all crew members are assigned tasks in the pursuit of the runaway barges. These are common occurrences which can traverse many miles of river and hours of time. A number of other hazards exist for members of a river boat crew.

Sinkings are a common occurrence when barges and vessels strike submerged objects such as a sunken barge whose marker buoy has been lost. A sinking barge or barges filling with water breaks its rigging within the tow causing the tow to break-up. Towboats have been sunk by submerged objects in less than three minutes when their hulls have been torn open. In one such incident, a Cook was lost by drowning.

Drownings are a daily hazard of life on the tow and vessel. The most common drowning occurs off the sides of the tow and boat when employees, through loss of balance or carelessness, fall over board beneath the tow or boat. Duck ponds, that open area formed by the four round corners of barges wired together, present a hazard at night and to those with poor vision at all times. There is no escape from a duck pond. The current draws the individual under the tow.

Fires on vessels occur most commonly from clutch fires. Engines

at full capacity turn at more than 900 rpm. When ice, trees and other debris foul the vessel's propellors and the engines continue to turn at such high speeds, friction at the clutch causes explosion and fire. Fires must be fought by all crew members and when it can not be contained, the crew must abandon the vessel and take refuge on the tow. Liquid cargo in tank barges or coal cargo can also cause fires on the tow requiring the crew, the entire crew, to respond with pumps and hoses. Adverse conditions such as ice, snow and fog delays any help the vessel may receive from other vessels.

Loss of power from the vessel's engines and generators causes loss of electric, pneumatic and hydraulic control of engines and steering. This commonly occurs after refueling when water is present in the new fuel.

Weather conditions such as fog, ice, snow, rain, and freezing rain increase the hazards of working on the tow and boat, of transfers between the tow, boat and other vessels.

Witte applied for employment as a Cook with the Company on November 12, 1982. After being interviewed and found to have the skills required to function as a Cook, Witte was examined by a Company physician. By letter dated March 8, 1983, Witte was informed she would not be employed aboard Company vessels because she did not possess the minimum vision requirements. At that time, uniform company policy required that all applicants for employment aboard Company vessels possess minimum vision requirements of 20/100 in one eye and 20/70 in the other eye. Upon examination, Witte was found to have no vision in her right eye due to congenital cataract.

Witte has acquired depth perception, that is, she can judge distances and depth from the size of known cues such as the width of a road or the size of a known object around her. Witte has worked as a cook in restaurants and children's camps. Additionally, she possesses an Associates Degree in food administration. She has also tended bar and engages in sports such as volleyball and softball. Witte also drives an automobile without any license

restriction.

Beginning in 1979, the Company developed physical standards for applicants for vessel positions. These standards as developed by the American Waterway Operators, the National River Academy, and the United States Coast Guard standards. While there are no USCG licensing requirements for Deckhands and Cooks employed on Company vessels, the aforementioned standards apply to endorsements, licenses and certificates issued by the USCG to Deckhands, Cooks, etc., who wish to be certified as Tankermen, Engineers, and vessel Operators. A Deckhand or Engineer may not engage in the loading or unloading of liquid cargoes without a Tankerman's Certificate issued by the USCG after testing and physical examination.

These minimum standards developed by the Company were based on experiences and expertise in the area of marine safety as they apply to the Company's working environment and the worst possible situation. The standards on lifting and the back recognize the physical burdens of the occupation carrying heavy loads over uneven surfaces. The eye standard recognizes the hazards of the environment of getting off/on vessels in all weather at all locations, tripping and falling hazards, as well as responding to emergencies where the most eyesight is available such as man overboard or throwing a life-ring.

Since 1979, these standards have reduced the number of employee injuries while the number of employees, mandays, and number of vessels has increased. For the year 1979, there were 258 personal injuries in the fleet. For the year 1985, these were reduced to 166. After positive drug screens and poor back x-rays, poor eyesight is the third most common reason for applicant rejection. Since 1979, 28 other applicants have been rejected for eyes, including nine for having sight in only one eye.

SUMMARY OF ARGUMENT

American Commercial Barge Line Company contends that this Court has, from its beginning, aggressively protected the exclusive admiralty and maritime jurisdiction of the United States to exercise their authority upon the navigable waters. The Court has recognized that while some State interests compel or allow regulation in areas of federal jurisdiction and that it may impact upon interstate commerce, only the most narrow exceptions have been allowed to impact upon maritime matters.

To allow the State of Indiana, through its Civil Rights Commission, to define and equivocate what constitutes a seaworthy person would disrupt and confuse the guidance and law enunciated by this Court as to what constitutes a seaworthy vessel and seaworthy crew.

While the State of Indiana may border and touch upon the navigable waters such as Lake Michigan and the Ohio River, its contacts with things maritime are remote. Its General Assembly has declared as a matter of public policy that handicap employment discrimination is unlawful. But this policy and authority does not extend beyond state borders.

The decision to deny employment to Witte was made in Jeffersonville, Indiana. But this fact alone does not justify extension of state policy to an area traditionally regulated by the federal government, Congress, and the federal Courts. This Court recognized this when it denied to the state of Texas its right to work state status upon navigable waters for employment decisions made in Houston, Texas. The Court focused on the nature and situs of the employment, not where decisions on employment were made.

The Decision and Order of the Indiana Civil Rights Commission was overturned by Indiana trial and appellate Courts because the Commission failed to yield to exclusive maritime jurisdiction and regulation, and further chose to impose its own brand of seaworthiness upon a maritime employer.

ARGUMENT

INDIANA CODE 22-9-1-13 provides:

> Sec. 13. (a) The prohibition against discrimination in employment because of handicap does not apply to failure of an employer to employ or to retain as an employee any person who, because of handicap, is physically or otherwise unable to efficiently and safely perform, at the standards set by the employer, the duties required in that job.
>
> (b) After a handicapped individual is employed, the employer shall not be required under this chapter to promote or transfer such handicapped person to another job or occupation, unless, prior to such transfer, such handicapped person by training or experience is qualified for such job or occupation.
>
> (c) This section shall not be construed to require any employer to modify any physical accommodations or administrative procedures to accommodate a handicapped person.

The purpose of this law is to enforce public policy as it applies to the employment of handicapped persons within the State of Indiana. It is the employer's position that it is exempt from coverage under the Act upon two grounds:

1. Business necessity and safety as provided by statute;
2. Prohibition of employment of handicapped persons upon vessels in the admiralty and maritime jurisdiction of the United States.

A. ADMIRALTY AND MARITIME JURISDICTION

Jurisdiction is the power to adjudicate a case upon its merits and dispose of it as justice may require. The Resolute 168 U.S. 437 (1987). The jurisdiction of any Court to deal with a subject matter is derived from constitutional instruments and valid laws. Cooper v. Reynolds 77 U.S. 309 (1870).

Admiralty and maritime jurisdiction is jurisdiction to adjudicate on matters which in accordance with the Constitution and valid

laws in force are appropriate subjects for determination. The character of this jurisdiction is indicated broadly by the name itself and as such it is comprehended within the judicial power of the United States conferred by the Constitution, Article III, Section 2, which provides:

> "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

There is not and has not been a contention between the parties that the employer's vessels do not operate within and upon the admiralty and maritime jurisdiction of the United States.

The purpose of the grant of admiralty and maritime jurisdiction to the Federal Government was to produce essential harmony and uniformity, U.S. Constitution, Preamble, to unify the several States in the national, international and interstate relationships and all other purposes were subordinate.

The several States were prohibited from making conflicting laws on subjects of national interest. Martin v. Hunters Lessee 14 U.S. 304 (1816).

The prevailing purpose is especially evident in the constitutional grant of judicial power where cases requiring national uniformity have been transferred from the States to the Federal Government and the judicial attribute of sovereignty to be exercised by such courts as Congress should provide. Under our constitutional system, there necessarily remains to the States until Congress acts, a wide range of permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. Minnesota Rate Cases 230 U.S. 352 (1913). However, where a conflict exists, the state legislation must fall. Gibbons v. Ogden 9 Wheat 1, (1803) Kelly v. State of Washington, ex rel Foss Co. Inc. 302 U.S. 1, (1937).

In the exercise of their admiralty jurisdiction, the federal courts are not bound by state statutes insofar as they make inroads on a harmonious and uniform system. State legislation, though recognized in certain aspects, consistent with the general principles and operation of the maritime law, is not permitted to displace the

characteristic features of the maritime law or to impair the uniformity designed to be established in conferring maritime jurisdiction on the United States. Union Fish Co. v. Erikson 248 U.S. 308 (1918). Just v. Chambers 302 U.S. 383 (1941), Romero v. International Terminal Operation Co. 358 U.S. 354 (1959).

Although no specific or express power exists in the Constitution conferring on Congress the power to legislate substantive maritime law and admiralty jurisdiction, certain express powers do exist such as to define and punish "Piracies and Felonies" on the high seas. The power "to regulate commerce" authorizes a great portion of maritime law. Additionally, the power "to make all Laws which shall be necessary and proper" to carry out and execute all the powers granted to the Federal Government. U.S. Constitution, Article I, Section 8, Crowell v. Benson 285 U.S. 22 (1956).

Congress thus has the paramount and undisputed power to fix, determine, alter and revise the maritime law which shall prevail throughout the United States. Waring v. Clarke 48 U.S. 441 (1847), the Lattowanna 88 U.S. 558 (1875).

Pursuant to its powers, Congress has from the beginning regulated shipping and maritime matters, 46 U.S.C. 740 which provides:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water:. . ."

Additionally, Congress has defined the rights and remedies of seamen and other maritime workers. Longshoremen and Harbor Workers Compensation Act, 33 USC 901 et seq, Jones Act 46 USC 688 as well as rights and remedies under the Federal Employers Liability Act 45 USC 50 et seq. The Longshoremen and Harbor Workers Compensation Act was the congressional response to the

Supreme Court's ruling negating the exercise of any state powers even when authorized by Congress, over essential federal maritime jurisdiction where this exercise of power conflicted with maritime law. Southern Pacific Company v. Jensen 224 U.S. 225 (1917), Knickerbocker Ice Co. v. Stewart 253 U.S. 149 (1920).

Like many states at the turn of the century, New York enacted a workmens compensation scheme for injuries and death occurring within the course and scope of employment.

Jensen was employed as a stevedore for Southern at its Pier 49, North River, Manhattan facilities. While engaged in unloading a vessel belonging to Southern, which was berthed at Pier 49 and laying upon the navigable waters of the United States, Jensen was killed. Upon a claim filed by his survivors, the State Industrial Commission made an award to Jensen's survivors of weekly benefits. Upon the appeal of Southern, the New York Court of Appeals upheld the award.

Upon appeal to the United States Supreme Court, Southern argued that the New York statutory scheme was unconstitutional and that it conflicted with admiralty jurisdiction and imposed a burden on interstate commerce. The Supreme Court agreed, holding:

> "Plaintiff in error being an interstate common carrier by railroad, is responsible for injuries received by employees while engaged therein under Federal Employers Liability Act." and "As applied here the Workmens Compensation Act conflicts with the general maritime law which constitutes an integral part of the Federal Law under Article III, Section 2 of the Constitution and to that extent is invalid."

The court reasoned the judicial power of the United States extended to all cases of admiralty and maritime jurisdiction pursuant to the Constitution, and further, that pursuant to Article I, Section 8, Congress has all the powers necessary and proper to execute the foregoing power. The Court found that Jensen's employment as a stevedore was maritime in nature, his employment was a maritime contract, the injuries which he received were likewise

maritime, and that the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction, citing Atlantic Transport Co. v. Imbravek 234 U.S. 52 (1914) which found injuries sustained by stevedores in the loading and unloading of cargo aboard vessels to be maritime injuries.

Knickerbocker arose as a result of the Congressional response to Jensen. In October 1917, Congress amended the judicial code relative to jurisdiction of federal courts as established by the Judiciary Act of 1789. Congress sought to amend the "saving to suitors" clause to include "and to claimants the rights and remedies under the Workmens Compensation law of any state."

Stewart was employed as a bargeman for Knickerbocker when he fell into the Hudson River and drowned on August 3, 1918. His widow made a claim under the New York Workemens Compensation statute and received an award from the Industrial Commission. On appeal by Knickerbocker of the foregoing award, the U.S. Supreme Court reversed, concluding that the enactment was an attempt by Congress to authorize the states to apply their respective Workmens Compensation statutes to the admiralty and maritime jurisdiction of the United States. As so construed, the Court stated:

> ". . . we think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, arises from the Constitution as above indicated. The definite object of the grant was to commit direct control to the federal government, to relieve maritime commerce from unnecessary burdens incident to discordant legislation, and to establish, as far as practicable, harmonious and uniform rules applicable through every part of the Union."
>
> ". . . The subject was entrusted to it, to be dealth with it according to its discretion - not for delegation to others."
>
> "Obviously, if every state may freely declare the

> rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

The social policies evidenced by the several states with their Workmens Compensation statutes were adapted by Congress with the passage of the Jones Act and the Longshoremen and Harbor Workers Compensation Act.

Having established the power of Congress and Federal Courts to regulate maritime employment, what recognized prohibitions exist to exclude handicapped persons from maritime employment.

B. THE DOCTRINE OF SEAWORTHINESS

Pursuant to the provisions of 46 USC 713:

> ". . . every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the "master" thereof; and every person (apprentices excluded) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of navigating on any sea or channel, lake or river . . ."

Prior to the enactment of the Jones Act in 1920, the seaman had no remedy against a shipowner beyond maintenance and cure (maritime workmens compensation) for injuries caused by negligence of the ship's officers and crew. There was a right to indemnity for injuries caused by the shipowner's negligent failure to maintain the vessel and its appliances in seaworthy condition. These rights were summarized in The Osceola 189 U.S. 158 (1903).

> "That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by a seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship . . ."

For almost twenty-five years after its passage, the Jones Act

was the seamen's chief vehicle for recovery for personal injuries. The Supreme Court's recognition in 1944 that warranty of seaworthiness was totally divorced from fault concepts furnished an entirely new source of recovery. Mahnich v. Southern S.S. Co. 321 U.S. 96, Seas Shipping Co. v. Sieracki 328 U.S. 85 (1946).

The question of what constitutes negligence under the Jones Act has assumed less and less importance as the scope of the warranty of seaworthiness has expanded. Since a seaman is not entitled to independent recoveries for negligence and seaworthiness, and since negligence is more difficult to prove than seaworthiness and because negligence requires a showing of actual or constructive knowledge, the liability for unseaworthiness has expanded to unmanageable proportions.

In Mahnich, the seaman plantiff was injured when the rope supporting the staging on which he was working parted. The rope which had been supplied by the mate had never been used and appeared to be in sound condition. Although there was every indication that the mate had acted with due diligence in selecting the rope, and that his choice was only fortuitously bad since other sound rope was available, the Court found that the vessel was unseaworthy and plaintiff entitled to indemnity for his injuries. The shipowner's "duty to furnish the employee with safe appliances and a safe place to work" was held to be non-delegable and not qualified by the fellow servant rule in the same manner that these defenses are precluded under the Jones Act.

The fellow servant doctrine, contributory negligence, and assumption of the risk are not available to employers pursuant to the Jones Act and the Federal Employers Liability Act and prior releases or contracts of exemption are void. 45 USC 50, 53 and 54, Robertson v. Baldwin 165 U.S. 275 (1897), Garrett v. Moore McCormack Co. Inc. 317 U.S. 269 (1942).

Two years later, the Supreme Court decided Sieracki and reemphasized the absolute independence of the seaworthiness warranty from negligence notions. In this case, a longshoreman, while engaged in the unloading of a vessel, was injured when a shackle

broke which supported a cargo boom. Improper forging had caused the defect which was not detectable by visual inspection. In holding that the ship was unseaworthy, the Court observed that unseaworthiness is:

> "essentially a species of liability without fault" and that
> "the liability is neither limited by conceptions of negligence nor contractual in nature" and that
> "it is a form of absolute duty owing to all within the range of its humanitarian policy."

The doctrine of unseaworthiness is ensuing years moved from defective gear and appurtenances to include: defective equipment not owned by the shipowner but brought aboard by stevedores, Alaska S.S. Co. v. Peterson, 347 U.S. 396 (1954); a crew that was unfit, Boudoin v. Lykkes Brothers Steamship Co. Inc. 348 U.S. 336 (1955); a vessel that was undermanned, Waldron V. Moore-McCormack Lines Inc. 386 U.S. 724 (1967); or incompetently manned, Boudoin supra; a method of work that was unsafe, Crumady v. Joachim Hendrik Fesser 358 U.S. 423 (1959); and a temporary condition, Mitchell v. Trawler Racer, Inc. 362 U.S. 539 (1960). Shipowners became virtual insurers of seamen's safety. The seaworthiness of a ship, her equipment, appurtenances and crew is a relative concept dependent in each instance upon the circumstances which its fitness is drawn into question.

The formulation most often quoted is that of the Supreme Court in Mitchell:

> "The owner is not obligated to furnish an accident free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection but reasonable fitness; not a ship that will weather every storm or withstand every imaginable peril of the sea but a vessel reasonably suited for her intended purpose."

In Mitchell, a seaman was injured when he slipped on slime and fish gurry which had accumulated on the ship's rail during the unloading process. The voyage had been completed and Mitchell

was leaving the ship for shore when the injury occurred. The Court specifically held:

> "Liability for a temporary unseaworthy condition is no difference from the liability which attaches when the condition is permanent."

In Crumady, the plaintiff, a stevedore, was injured when a cargo boom and tackle were rated at three tons. The winch controlling the wire through which the boom and tackle operated had an electrical cut-off device which was set at a 6 ton limit by the stevedores. The Court found the vessel unseaworthy for the fact that it supplied a winch having a safety load set far in excess of the cargo boom and tackle. The Court held, citing Mahnich:

> "as to appliances, the duty of the shipowner does not end with supplying them; he must keep them in order. The shipowner is not relieved of these responsibilities by turning control of the loading and unloading of the ship to a stevedoring company."

Waldron involved a suit for personal injuries against the shipowner for injuries caused when too few men were assigned to the task. Plaintiff and four other seamen were engaged in handling lines while the ship was being docked. At the last minute, the third mate who was directing the operation ordered plaintiff and another seaman to uncoil and carry an 8 inch rope to the side of the vessel. In the course of this assignment, he fell and was injured.

In finding that insufficient manpower assigned to a particular task can result in unseaworthiness, the Court, citing Boudoin, saw no reason to draw a line between incompetent or insufficient seamen:

> "This analysis, we believe, is required by a clear recognition of the needs of the seaman for protection from dangerous conditions beyond his control and the role of the unseaworthiness doctrine which, by shifting the risk to the shipowner, provides that protection. If petitioner had been ordered to use a defective pulley in the lifting the rope he would clearly be protected by the doctrine of seaworthiness. If the pulley itself were sound but

> petitioner had been ordered to load too much rope but two of them lacked the strength of ordinary efficient seamen, petitioner would again be protected. Should this protection be denied merely because the shipowner instead of supplying petitioner with unsafe gear, insufficient gear or incompetent manual assistance, assigned him insufficient manual assistance. We think not . . ."

Boudoin arose out of a suit by a seaman for injuries and loss of wages as a result of an attack upon him by a fellow crew member. The evidence showed, and the District Court found, his assailant was drunk at the time, and in addition, had a savage disposition as to endanger others working on the ship.

In affirming this decision, the Supreme Court stated:

> "We see no reason to draw a line between the ship and the gear on the one hand and ship's personnel on the other."

Defective personnel were to be measured by the "usual and customary standard of the calling." The court found the District Court justified in concluding that plaintiff's assailant:

> ". . . was not equal in disposition to the ordinary men of the calling and that the crew with Gonzales as a member was not competent to meet the contingencies of the voyage."

From the foregoing, several principles of exclusive federal maritime law apply:

> 1. A seaworthy vessel is a vessel that is fit for its particular purpose;
>
> 2. The shipowner has an absolute duty to provide a seaworthy vessel to its crew;
>
> 3. The warranty of seaworthiness applies to the vessel, its equipment, its appurtenances, and its crew;
>
> 4. Seaworthiness is a judicially fashioned doctrine applicable by the United States Constitution to admiralty and maritime jurisdiction of the United States;
>
> 5. Maritime negligence, as it applies to seamen's death

and injuries, is a federal policy enacted by Congress and applies to the admiralty and maritime jurisdiction of the United States;

6. The several States may not legislate contrary to a uniform maritime law.

That the several states may not legislate contrary to federal maritime law was decided in Oil, Chemical, Atomic Workers, International Union v. Mobil Oil Co. 426 U.S. 407 (1976). This case involved the conflict between federal and state statutes regulating employment.

Under the National Labor Relations Act, 29 U.S.C. 151 Et. Seq., Section 14(b) allows the individual States to enact so-called right to work laws. Section 8 (a)(3) of the Act provides that parties to a collective bargaining agreement may make membership in the Union a condition of employment, and thus, the obligation to pay Union dues and assessments. Section 14(b) allows the individual States the option of exempting themselves by legislation from the Union membership requirements. Texas had for many years been a right to work State. The parties to the OCAW/Mobil Agreement had had a collective bargaining relationship for many years, and during that period of time, negotiated and administered several collective bargaining agreements.

After their most recent agreement was executed, and containing the same Union security language as had existed in prior agreements, the Company announced it would no longer force the Union security provisions requiring membership in the Union as a condition of employment.

The Union filed suit for enforcement of the agreement in Federal Court. The Company defended on the basis that its Marine Transportation Division was located in Houston, Texas, and under Texas law, the right to work provisions of the Union security language of the agreement were unenforceable and void. The evidence indicated that all personnel records, decision, and payroll were made in Houston. The evidence also indicated that none of the employees in the bargaining unit worked in Texas but aboard vessels of the

Company upon the navigable waters. The Union argued that the provisions of 14(b) were not applicable to the exclusive federal maritime jurisdiction.

The Supreme Court adopted the Union's arguments on the facts. The Court found Mobil's employees to be seamen who worked exclusively upon navigable waters and thus found 14(b) inapplicable.

The same rational applies to the present case. The hiring decisions and employment policies of ACBL arise in Jeffersonville, Indiana. However, the work situs of its employees is upon the navigable waters. This is exclusive federal jurisdiction. It is exclusive in terms of situs and employee status as seamen. The application of State employment law, contrary to maritime policy, is prohibited. OCAW, Jensen, Knickerbocker, supra.

CONCLUSION

Petitioner's argument faults the Indiana Court of Appeals for relying upon the provisions of 28 U.S.C. 1331 (1) to support its judgement in the matter. Petitioner fails to note the Indiana Court of Appeals also relied upon the decisions of this Court in Jensen and Knickerbocker supra to reach its conclusions.

Petitioner's argument that the "saving to suitors" provisions of 28 U.S.C. 1331 (1) allows Indiana to exercise its statutory authority upon the navigable waters, patently ignores the law in Knickerbocker. If Congress could not constitutionally delegate jurisdiction to New York for its Workmens Compensation scheme upon the navigable waters, certainly Indiana can not usurp it by statutory fiat against handicap discrimination upon navigable waters.

Next, Petitioner faults the Indiana Court of Appeals for:

(a) failing to apply the right standard of seaworthiness;

(b) applying the wrong standard of seaworthiness;

(c) by holding that maritime industry standards take precedence over state law when they conflict.

While this characterization may be slanted by perception and advocacy, Petitioner has failed to demonstrate any logical connection between its conclusions above and the Opinion of the Indiana Court of Appeals.

What the Indiana Court of Appeals states was that the Indiana Civil Rights Commission

> "failed to apply or even consider the seaworthiness doctrine in evaluating Wittes claim."

The Indiana Court of Appeals specifically relied upon Indiana law, the "safety and efficiency" condition of IC 22-9-1-13 (a) and found that it does not conflict with the federal seaworthiness doctrine, and concluded,

> "in this case, resort to the seaworthiness doctrine was necessary to preserve uniformity in the industry."

No standards of seaworthiness were altered, amended, changed, applied or misapplied. Simply stated, the Indiana Civil Rights Com-

mission ERRED by failing to consider and apply admiralty law.

Finally, Petitioner notes that American Commercial Barge Line, at the hearing in the matter, failed to show that "having monocular vision affects a person's ability to function."

At the hearing in the matter, the question presented to Petitioner's alleged expert witness stated:

> Q: Let me ask you this question Mr. Silver. Again based on your experience, your expertise, your visit to the vessel, your knowledge of Miss Barone, could you tell me what vision she would have if a foreign object were to lodge in her eye, her good eye, the eye from which she has vision, would you tell me what vision she would have?
>
> A: WELL, MOMENTARILY SHE WOULDN'T HAVE ANY VISION. Transcript of Hearing - Page 64.

A blind seaman responding to an emergency of the vessel becomes an emergency to the detriment of the vessel and the remainder of the crew.

As for its reasons why certiorari should be granted, Petitioner states "a lot of confusion exists" as to how far States can go in regulating the employment practices of maritime employers. Without any facts or circumstances to support this conclusion, Petitioner asks the Court to clarify this area of the law. To date, the only confusion that has existed in this matter has been that of the Indiana Civil Rights Commission, not maritime employers or the Courts.

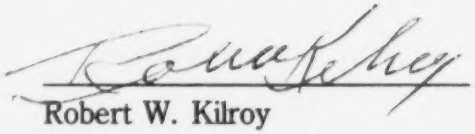
While this case may be important to the people of Indiana, it has been the people's elected judges who have concluded the Indiana Civil Rights Commission has erred. While the minimum physical standards of American Commercial Barge Line prohibit "a lot of handicapped people" from working on its vessels, these standards have a rational connection to industry hazards, safety and efficiency considerations.

There is nothing in the record of this case, or extant events, which give this case "national implications." It is a simple case of state administrative agency error which has been connected by

State Courts.

Petitioners are simply incorrect as to their characterization that federal law does not prohibit discrimination in employment based on handicap. The Rehabilitation Act of 1973, 29 U.S.C. 701 et seq. prohibits employment discrimination based on handicap, and these provisions are enforced by the Department of Labor, Office of Federal Contractor Compliance.

For all the foregoing reasons, Petitioners Writ of Certiorari should be denied.



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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar and Officer of this Court, certifies that three (3) copies of the foregoing Brief In Opposition were served this 19th day of June, 1989 by first class mail, postage prepaid, and addressed to:

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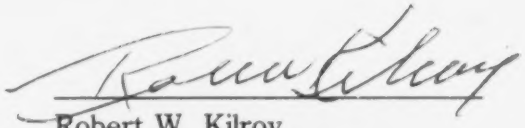

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